

**MINUTES  
of the  
FIRST MEETING  
of the  
DISABILITIES CONCERNS SUBCOMMITTEE  
of the  
LEGISLATIVE HEALTH AND HUMAN SERVICES COMMITTEE**

**August 15, 2014  
Room 307, State Capitol  
Santa Fe**

The first meeting of the Disabilities Concerns Subcommittee of the Legislative Health and Human Services Committee (LHHS) was called to order by Senator Nancy Rodriguez, vice chair, on August 15, 2014 at 9:40 a.m. in Room 307 at the State Capitol in Santa Fe.

**Present**

Sen. Nancy Rodriguez, Vice Chair  
Sen. Craig W. Brandt  
Sen. Linda M. Lopez  
Rep. James Roger Madalena

**Absent**

Rep. Doreen Y. Gallegos, Chair  
Rep. Nora Espinoza

**Advisory Members**

Rep. Miguel P. Garcia  
Rep. Edward C. Sandoval  
Rep. Elizabeth "Liz" Thomson

Rep. Phillip M. Archuleta

**Guest Legislator**

Sen. Gerald Ortiz y Pino

**Staff**

Shawn Mathis, Staff Attorney, Legislative Council Service (LCS)  
Rebecca Griego, Records Officer, LCS  
Nancy Ellis, LCS

**Guests**

The guest list is in the meeting file.

**Handouts**

Copies of all handouts are in the meeting file, including those from public comment.

**Friday, August 15**

**Call to Order and Introductions**

Senator Rodriguez welcomed those assembled and asked subcommittee members and staff to introduce themselves.

**Employment of Persons with Disabilities**

Jim Jackson, executive director of Disability Rights New Mexico, gave members of the subcommittee an overview of two recent federal initiatives that could provide more jobs at higher wages for individuals with disabilities. He also described options for potential state legislation that could promote such employment by state contractors (see handout). Before detailing the federal initiatives, Mr. Jackson cited "dismal employment statistics" for persons with disabilities: over 11.8 percent of working-age New Mexicans have a disability; the unemployment rate for persons with disabilities is 6.5 to 7.2 percent higher than for nondisabled workers; and workers with disabilities earn 20 to 23 percent less than those without disabilities.

Section 503 of the federal Rehabilitation Act of 1973 applies to businesses that contract to provide goods and services to the government. It prohibits discrimination in employment against persons with disabilities and requires affirmative action to employ and promote persons with disabilities. Amendments to this section, which became effective this past March, apply to all federal contractors with contracts worth \$10,000 or more. A written affirmative action plan is required of businesses with 50 or more employees and at least \$50,000 in contracts. Major changes to the regulations include a work force utilization goal that at least seven percent of employees in each work group or company as a whole must be persons with disabilities as defined by the federal Americans with Disabilities Act of 1990 (ADA); new requirements for data reporting (number of applicants, how many self-identify as disabled and how many were hired); permission to ask applicants, pre-offer and, again, post-offer, to voluntarily disclose a disability as part of an affirmative action program; and a survey of existing employees on a voluntary basis every five years. A contractor not meeting the utilization goal is required to self-assess whether there are barriers to equal opportunity employment and, if so, must develop a plan to address those barriers. Mr. Jackson said that sheltered workshops cannot be used to meet the utilization goal and cannot be part of an affirmative action plan unless the company hires those persons in bona fide jobs at prevailing wages. If the overall goals of the new regulations are met, there could be employment for 600,000 additional persons with disabilities, Mr. Jackson said.

The second initiative is Executive Order #13658, issued by President Obama on February 12, 2014, that establishes a minimum wage of \$10.10 for most employees of most federal contractors, the wage increasing each year based on the Consumer Price Index. This order applies to procurement contracts for construction covered by the federal Davis-Bacon Act, contracts for services provided to or on behalf of federal agencies covered by the federal Service Contract Act of 1965, contracts to operate concessions and contracts related to use of federal property or lands and involving services provided to federal employees, their dependents or the general public. The executive order does not apply to federal grants, contracts or grants to Indian

tribes, contracts for public utilities or contracts to provide materials, supplies or equipment to the federal government. Employees covered by this executive order include those entitled to minimum wage under the federal Fair Labor Standards Act of 1938 or the Service Contract Act, laborers and mechanics covered by the Davis-Bacon Act and employees covered because they are working on federal contracts. The order specifically includes workers with disabilities who are otherwise paid less than the minimum wage by contractors authorized to pay sub-minimum wage. Such workers now must be paid at least \$10.10 per hour for work performed on federal contracts covered by the executive order, which is expected to be finalized no later than October 1, 2014.

Similar legislative initiatives could be adopted at the state level, Mr. Jackson said, requiring at least minimum wage for anyone working on a state contract. The state also could give preference in bidding as an option to address the significant underemployment of New Mexicans with disabilities.

On questioning, Mr. Jackson and subcommittee members discussed the following topics.

*Legality of paying less than minimum wage to disabled workers.* Mr. Jackson said that a New Mexico contractor can pay an employee with disabilities less if that individual is not as productive, but typically this is done through a nonprofit or a sheltered workshop, a process which must be monitored through periodic reports. Speaking from the audience, Mike Kivitz, president and chief executive officer (CEO) of Adelante Development Center in Albuquerque, said that when there is any payment differential, records must be kept to justify it. It is less efficient to have two people doing the job of one, he said, and containing costs means managing labor expenses. For-profit companies can do this as well as nonprofits, but if it was a good way to make money, then for-profits would be lining up. His organization agrees with increasing incentives, and the State Use Act does this.

*Role of the State Use Act.* The State Use Act is not a preference program, Mr. Jackson explained, rather it is a set-aside. A state agency or local public body contracting for services is required to first offer the contract to businesses or individuals who are on an approved list of vendors or products provided by persons with disabilities. A purchasing council determines and updates this list. A member asked who is on this council and whether the executive branch asserts control. The council has nine members, Mr. Jackson said, five of whom are state employees. Those five members pick the other four, two who represent either a nonprofit or contractor, and two who must be persons with disabilities. Mr. Jackson noted that Mr. Kivitz was a member of this council. There are issues with some purchasers who feel they should have the right to choose when it comes to contracting for professional services, Mr. Jackson said. The State Use Act has been effective, he said, with more than 500 New Mexicans working under it.

*Expansion of ADA definitions of "disability".* Definitions in the ADA have been updated and broadened from court decisions in related cases, Mr. Jackson said. He cited a United States Supreme Court ruling that eyeglasses or prosthetics can mitigate a disability and that an individual using these may not be classified as a person with a disability. A member inquired

about alcoholism and illegal drug use under ADA definitions. A recovering person is a protected category, Mr. Jackson said, including persons with a history of mental illness that is being controlled by medication. The member asked if the state could adopt the new federal Section 503 regulations. Yes it could, Mr. Jackson said, and it would be good public policy.

**Update on Centennial Care (CC) for Developmental Disabilities (DD) Waiver Recipients and Persons on Wait List; Update from the Income Support Division of the Human Services Department (HSD)**

Brent Earnest, deputy secretary, HSD, provided a fact sheet (see handout) to subcommittee members describing the successful transition to CC of more than 400,000 members on January 1, 2014 and of an additional 143,474 who have signed up under the adult Medicaid expansion category as of July 8, 2014. Mr. Earnest detailed new benefits and features of CC, including care coordination, community benefit, community interveners and a member rewards program intended to encourage individuals to become more active in their health care. He also described ongoing Native American advisory meetings that seek to facilitate enrollment, access to care and payment for services for Native Americans, as well as to address other concerns. Care coordination is central to the program, Mr. Earnest said, with every individual CC member receiving a health risk assessment. Many new initiatives were launched at the same time, he said, and some problems have been encountered with the state's ASPEN computer program in processing data from the four managed care organizations (MCOs) and with the eligibility portal. As problems arise, they are being addressed, he assured members. The HSD is meeting with the Department of Health (DOH) to help facilitate the release of state funding to increase DD waiver provider rates by November 1, if not sooner, Mr. Earnest said, and hopefully to make these increases retroactive to July 1.

On questioning, Mr. Earnest, Jennifer Thorne-Lehman, deputy director of the Developmental Disabilities Supports Division (DDSD), DOH, and subcommittee members addressed the following topics.

*Need for accurate data reporting.* Mr. Earnest and Ms. Thorne-Lehman agreed that information technology issues have created problems in the CC rollout, and they said that MCOs have been asked not to deny provider payment claims until a fix is in place. Members asked for, and Mr. Earnest and Ms. Thorne-Lehman agreed to provide, data on behavioral health dollars and how they are being spent, the number of individuals who have accessed applied behavioral analysis (ABA) for autism, the calendar and locations for quarterly consumer meetings, the number of members in each level of care coordination and a breakdown of categories for the approximately 6,300 individuals on the DD waiver central registry (wait list). Another member asked for an age breakdown of this list as well, and for information on the evaluation process for applicants.

*Concerns about Supports Intensity Scale (SIS) evaluations.* Several members asked about the current status of the SIS and asked for data on those who requested to retake the assessment. The vast majority of reassessments have been completed, Ms. Thorne-Lehman said, although she did not have specific data today on whether those reassessed individuals went up or down in

category, but she will get this to the subcommittee. The HSD has contracted with the University of New Mexico (UNM) to train for and conduct SIS assessments locally rather than using an out-of-state contractor, and the process is going much more smoothly. Also, families are better educated about the SIS beforehand, she said.

*Efforts to reduce the DD waiver wait list.* Ms. Thorne-Lehman said that last year, 400 individuals were brought off the wait list into waiver services. There were 326 letters of invitation sent out this spring, with 182 selecting either Mi Via or the DD waiver. Because this is below the target of 226, another batch of letters will be sent out, she said. There has been an increase in persons selecting Mi Via, which is a more cost-effective program, and perhaps after looking at the budget, it will allow additional persons to be moved off the wait list and into services.

*Adequate staffing levels.* Ms. Thorne-Lehman said that the DDS hired two temporary workers in fiscal year (FY) 2014, and temporary workers are again being sought for FY 2015. One position has been posted as the result of retirement. Temporary workers are involved in efforts to update information on the wait list.

*Outreach to Native Americans.* A member asked that the MCOs make a report to the LHHS on outreach. He has heard much about a contract with Native American Professional Parent Resources, Inc., but has no idea how this group has spent the money. He would like a report to the Indian Affairs Committee as well, since he is concerned about getting the word out to rural tribal areas.

#### **Provider Panel: Update on DOH Provider Rate Increases**

Anna Otero Hatanaka, executive director of the Association of Developmental Disabilities Community Providers, spoke for her membership when she stated that the developmental delay and disability service systems are unsustainable and that provider agencies are struggling for survival due to increased operating costs and a lack of rate increases (see handouts). Funding for rate increases appropriated for Family Infant Toddler program (FIT) providers, the DD state general fund program providers and for Medicaid DD waiver providers, which has not yet been released, will help providers, she said, but it will not make them whole. Ms. Hatanaka said she is concerned that \$1 million of this appropriation is in danger of reverting to the general fund since the DOH has taken so long to implement the increase. In addition to sustainable rate increases, she urged the DOH to streamline practices, simplify and reduce compliance costs and conduct a new FIT cost study since the recommendations of the previous 2003 study have never been fully funded (see handout). In addition to extreme fiscal challenges, provider agencies cannot compete with hospitals, schools and other entities in recruiting and maintaining staff.

Jim Copeland, executive director of Alta Mira Specialized Family Services, a nonprofit that serves people of all ages with developmental risks, delays or disabilities in Bernalillo County, expressed gratitude for the small provider rate increase. He said his organization lost more than \$90,000 in funding last year, and the rates are based on a study that is 10 years old.

Early intervention providers continue to have additional requirements placed upon them, and a new federal law requires immediate services, even if the organization does not have the funding to provide them. The current rates do not cover the cost of services, he said.

Edward J. Kaul, CEO of ARCA, an Albuquerque nonprofit serving children and adults with developmental disabilities, noted that providers are being asked to serve persons with the highest level of needs at a very low rate. The legislature's help is needed to make this a sustainable system, he said. There has been a dramatic escalation in reporting and documentation requirements under the DD waiver, and there has been no support from the DOH for increased administrative costs. Mr. Kaul said his organization is eager to pay staff a living wage and benefits. At the core of a DD individual having a good life is knowing the staff and seeing them as members of the family.

Mr. Kivitz described 35 years of his organization's social service to the DD community. The last five years have been very rough, he said, and now Adelante is not sure it can survive. The nonprofit has lost \$2.5 million since 2009, and Mr. Kivitz said it has been a nightmare trying to manage all of the additional standards. Adelante has lost \$600,000 in each of the past two years as a provider of DD waiver services, and it may not be able to continue. Mr. Kivitz maintained that there is a disconnect between reality and the DDS, drawing subcommittee members' attention to an invitation he just received to a "quality summit". If the state is serious about quality, he noted, it could cut the regulations. Providers have already given stacks of input to the DOH.

Donna Hooten has worked for LEADERS, a nonprofit assisting persons with developmental disabilities in Lea County, for the past 23 years and said she loves the people she has chosen to serve. In June 2011, her agency had to shut down its early childhood program due to financial losses. Since 2001, health insurance costs for employees have risen 94 percent, and the last increase for direct support staff was 24 cents per hour, and that was four years ago. With Lea County in an oil boom, Ms. Hooten said she cannot compete with other employers' wages, and LEADERS is now down 17 staff members. A \$500,000 increase for provider rates statewide is a drop in the bucket, she said. Her agency will be \$300,000 in the red by the end of the year and will have to dip into cash reserves, which will be gone in two years. Gary Beal, a long-time LEADERS board member, was recognized by the vice chair to speak from the audience. The strong economy in Hobbs makes it impossible for the nonprofit organization to compete with other employers, he said. There is nowhere else to turn, Ms. Hooten said, and she asked subcommittee members for their help.

On questioning, panel presenters, Ms. Thorne-Lehman and subcommittee members addressed the following topics.

*Why is the DOH not requesting funds for rate increases?* Ms. Thorne-Lehman said that because there have been reversions to the general fund over the last several years, it is thought that rate increases can be accomplished within the DD waiver budget. Another member inquired whether the department agrees that rate increases are needed; Ms. Thorne-Lehman said there is

agreement for the increases that have been requested. Asked if the state sets the rates, she said that it does, but the rates have to be approved by the federal government; regulations that came out in March require a transition plan to increase rates.

*Importance of rate increases in the Legislative Finance Committee (LFC) budget process.* A subcommittee member commented that legislators are sympathetic to this issue, but nothing happens. Rate increases have to be in the LFC budget or they are going nowhere. The vice chair said she would ask the LFC staff to make it a priority.

### **Autism Update Panel**

Patricia Osbourn, deputy director of the UNM Center for Development and Disability (CDD) and director of the Autism and Other Developmental Disabilities Program at the UNM CDD (see handout), said the world of autism is changing rapidly. Prevalence of autism spectrum disorder (ASD) is now one in 68 children, according to the latest report from the federal Centers for Disease Control and Prevention, Ms. Osbourn said. In New Mexico, 370 to 390 new cases are being diagnosed every year. At the UNM CDD, there are two multidisciplinary clinics, one for children under the age of three and the other for three-year-olds up to the age of 21, the latter group not having the benefit of early intervention. The ratio of males to females with ASD diagnosis is five to one, she said, with nearly half at average or above-average IQ. The wait list for evaluation in New Mexico is long — 10 months — and many school districts will not serve these students unless they have an evaluation from UNM, further delaying help for these children.

A lot of research is being conducted on ASD currently, and the American Academy of Pediatrics is recommending that screening be done at 18 and 24 months to rule out ASD using valid screening tools, Ms. Osbourn said. ABA does benefit children in early intervention, and Medicaid will pay for this, but details have not yet been worked out. ABA is expensive, requiring 15 to 20 hours per week of hands-on interaction by persons who are supervised. A registered behavior technician will be required to have 40 hours of training, and the UNM CDD will be piloting a program this year for 40 individuals. The UNM CDD has received numerous calls from Medicaid MCOs for autism-specific assistance, and many families have reported problems with behavioral health services, she said. The behavioral piece of ASD is huge.

Gay Finlayson, education and outreach manager of the UNM CDD, said the advent of CC has affected this population. Last year, funding was appropriated to establish an oversight team for MCOs to problem-solve on autism, she said, and hopefully to establish a standard approach to out-of-state residential treatment, which can cost upwards of \$250,000 a year. Residential treatment is not a preferred approach and is done strictly for safety issues when the child is a danger to self or others. Ms. Finlayson said there is a need to look at best practices, since many out-of-state residential programs do not have autism expertise. Medicaid home- and community-based services for ASD are not reimbursed by CC. School educators are very interested in ASD and eager for training (see handout), and the UNM CDD is hoping to partner with other groups to help make significant changes.

Ms. Finlayson was asked by a member about a residential program in Albuquerque. There is a program in Albuquerque where families have been sending their children, she said, but there have been some problems, and it is not on the UNM CDD's list of recommended facilities. Asked whether CC and the MCOs have been helpful, Ms. Finlayson said that care coordination has been difficult and that efforts to resolve ABA therapy issues have been delayed until October.

### **Public Comment**

Robert Kegel, a parent and an advocate for the developmentally disabled, provided subcommittee members with a copy of a stipulated interim agreement from United States district court between John and Karin Waldrop, parents of a disabled individual, and the HSD (see handout). The agreement, dated June 26, 2014, provides that people in SIS categories C through G who feel that their health and safety are at risk can go through the H application process. The SIS was designed by bureaucrats and is against state law, Mr. Kegel asserted, because it was done without proper geographic meeting distribution or public meeting notices. Mr. Kegel described difficulties for a friend whose daughter needed more care than her SIS category allowed and who faced extended delays in paperwork to change categories and for case manager replacement. The daughter is now in hospice.

Mr. Kegel also referred to a deposition taken last week regarding the Burns rate study for a trial that begins Monday. Burns was brought in by the state to set the rates the state wanted, Mr. Kegel asserted, but all that is needed now is to plug real numbers from providers into the Burns framework. He added that the department can easily obtain a blanket waiver from the Centers for Medicare and Medicaid Services for rate increases, instead of waiting to go through each and every small rate change. Critics claim that New Mexico's DD waiver costs are among the highest in the nation, Mr. Kegel said, but this is not true. He would ask them to compare instead the states' administrative costs for the DD waiver program, contending that New Mexico's administrative costs are extraordinary and among the highest in the nation. These folks think they are money managers, Mr. Kegel concluded, but they are not folks who care for people.

### **Adjournment**

There being no further business, the subcommittee adjourned at 3:40 p.m.